

Winter 2013



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Delaware Court of Chancery Holds Sellers' Failure to Meet Sales Forecasts Could be a "Material Adverse Effect"

In *Osram Sylvania Inc. v. Townsend Ventures, LLC*, the Delaware Court of Chancery declined to dismiss claims by Osram Sylvania Inc. ("OSI") that, in connection with OSI's purchase of stock of Encelium Holdings, Inc. from the company's stockholders, Encelium's failure to meet sales forecasts and manipulation of financial results by the Sellers amounted to a material adverse effect. The decision was issued in the context of post-closing indemnity claims asserted by OSI against the Sellers and not a disputed closing condition. For more detail, click [here](#).

Delaware Court of Chancery Addresses Post-Merger Breach of Fiduciary Duty Claims

In *In re Bioclinica, Inc. Shareholder Litigation*, the Delaware Court of Chancery dismissed a stockholder suit alleging that the members of a board of directors breached their fiduciary duty of loyalty in a sale process for a transaction that had since closed, and where plaintiffs' allegations previously had been found insufficient to support a pre-closing motion to expedite. Under those circumstances, the court found the chances of those same allegations surviving a post-closing motion to dismiss to be "vanishingly small." Moreover, the court reaffirmed that reasonable deal protections, such as no-solicitation provisions, termination fees, information rights, top-up options, and stockholder rights plans, in the context of an otherwise reasonable sales process, are not preclusive and do not, in and of themselves, demonstrate a breach of the duty of care or loyalty. Finally, the court dismissed claims against the acquirer that it aided and abetted the directors' breach of fiduciary duties because no breach of such duties was found. For more detail, click [here](#).

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Delaware Court of Chancery Holds That Board Did Not Breach Fiduciary Duties or Create an Unfair Election in Proxy Contest

In *Red Oak Fund, L.P. v. Digirad Corp.*, the Delaware Court of Chancery held that the Digirad board of directors did not breach its fiduciary duties or create an unfair election process where: (i) preliminary election results that showed the incumbents in the lead were accidentally disclosed to a large stockholder; (ii) certain preliminary proxy reports inaccurately reported a large lead by management; (iii) the company delayed disclosure of negative financial results until after the election; and (iv) management proxy materials did not disclose that the board was considering a stockholder rights plan (a “poison pill”). For more detail, click [here](#).

Other Notable Developments

In *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLP*, the Court of Chancery held that where a merger agreement lacks a provision that excludes pre-merger attorney-client communications from the assets transferred to the acquiring corporation in a merger, the surviving corporation owns and controls any pre-merger attorney-client communications. The Court, however, provided that parties can negotiate “special contractual agreements to protect themselves and prevent certain aspects of the privilege from transferring to the surviving corporation in the merger.” To view the Court of Chancery’s opinion, click [here](#).

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M&A Markets

The following issues of M&A at a Glance, our monthly newsletter on trends in the M&A marketplace and the structural and legal issues that arise in M&A transactions, were published this quarter. Each issue can be accessed by clicking on the date of each publication below.

➤ [October 2013](#)

➤ [November 2013](#)

➤ [December 2013](#)

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